

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
Revisions to Cable Television Rate Regulations	)	MB Docket No. 02-144
	)	
Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation	)	MB Docket No. 92-266
	)	
	)	
	)	
Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation	)	MM Docket No. 93-215
	)	
	)	
	)	
Adoption of a Uniform Accounting System for the Provision of Regulated Cable Service	)	CS Docket No. 94-28
	)	
	)	
Cable pricing Flexibility	)	CS Docket No. 96--157

**COMMENTS OF EVEREST MIDWEST L.L.C. DBA EVEREST CONNECTIONS**

Everest Midwest L.L.C.dba Everest Connections is a facilities-based broadband service provider offering voice, video and data services over a hybrid fiber coaxial cable network in four cities of the Kansas City metropolitan area.

The FCC issued a *Notice of Proposed Rulemaking and Order* (“Notice”) MB 02-144; FCC 02-177, adopted June 13, 2002 and released June 19, 2002 and revised by *Order* MB 02-144; FCC 02-228, adopted August 6, 2002 and released August 14, 2002. In this docket, the Commission indicates its intention to update is cable television rate regulations to reflect the end of its jurisdiction over rates for cable programming services pursuant to the Telecommunications Act of 1996.

In paragraph 52 of the *Notice*, the commission seeks comments on concerning how its rate regulation process might be improved with regard to the procedures used to demonstrate the presence of effective competition. While the Commission in paragraph 53 appears to be focused on expediting effective competition showings when a satellite multichannel video programming distributors competes with an incumbent cable company, Everest believes the Commission also must examine the procedures and substantive evaluations the Commission uses when the cable competitor also is a local exchange carrier.

### **INTRODUCTION**

Everest urges the Commission to review the application of Rule 76.984, which was adopted to carry out the mandate of 47 U.S. C. § 543(d), which prohibits cable operators from selling the same service at different prices in different parts of a given franchise area unless the franchise area as a whole faces effective competition (the “uniform rate requirement”). There are a number of Petitions for Special Relief filed by incumbent cable operators and several complaints filed by competitive cable companies each of which address certain issues that all revolve around the central issue of geographically uniform pricing in the absence of effective competition. Some of these cases have been pending for a number of months; others have been pending for more than a year. The Commission’s inaction has allowed incumbent cable operators to engage in certain behaviors as if they do not violate the statute. Everest believes that through inaction, the Media Bureau has allowed the uniform rate requirement to become a meaningless shell.

While the FCC’s inaction creates a climate of uncertainty, regardless of the issue, failure to decide whether an incumbent violates the uniform rate requirement when it

engages in any of the particular actions that are the subject of dispute in the pending adjudications is particularly troubling. This is so for two reasons. First, the policy vacuum created by failure to address these matters has allowed this conduct by incumbent cable operators to continue with *de facto* approval by the regulatory body. Second, if new entrants are correct that any of the challenged conduct is unlawful, by failing to issue an order finding such conduct to be unlawful and by permitting the conduct to occur, the FCC is a party to conduct that threatens competition.

To fulfill its statutory duty and to ensure that competition has a chance to survive, the Commission should decide in this rulemaking whether each specific type of incumbent cable operator conduct whose lawfulness has been fully briefed in other proceedings is lawful under the uniform rate requirement.

### **DISCUSSION**

Below, is a list describing each long-pending question about whether particular conduct by incumbent cable operators is lawful under the uniform rate requirement and listing the proceedings in which pleadings on that issue have been filed. We incorporate by reference into the present comments all pleadings that have been filed in each of these other proceedings, and we urge the Commission to decide in the present rulemaking each of the issues from those adjudications that are listed below.

**1. Does an incumbent cable operator meet its obligation under the LEC test to show that the LEC's system "substantially overlaps" the incumbent's system by showing that the LEC's system passes a single household that the incumbent's system passes?**

This issue is before the FCC in CSR-5530 instituted March 14, 2000 (Chicago area effective competition proceeding), CSR-5701 instituted May 11, 2001 (Austin, TX effective competition proceeding), CSR-5862 instituted March 1, 2002 (complaint against

Adelphia for providing non-uniform pricing in Arcadia, CA), CSR-5845 instituted Feb. 1, 2002 (complaint against Time Warner for non-uniform pricing in Kansas City, MO), and CSR-5956 instituted August 2, 2002 (Shawnee, KS effective competition proceeding), CSR 5993 instituted on September 24, 2002 (Overland Park, KS effective competition proceeding). While there is no dispute between incumbent cable operators and LECs that the incumbent must show that the LEC's system "substantially overlaps" the incumbent's system before the incumbent will be deemed to be subject to effective competition, there is considerable dispute about what constitutes "substantial overlap." Incumbent cable companies claim that the LEC's system substantially overlaps the incumbent's system if it passes a single household. LECs, by contrast, argue that significantly more overlap than a single household is required in order for the LEC's system to be deemed to "substantially overlap" the incumbent's system. It is important that the FCC resolve this issue rather than let it continue to linger since the agency's decision on this matter affects the meaning of "effective competition" in all franchise areas where a LEC proposes to provide cable service.

**2. Since the uniform rate requirement bars an incumbent cable operator from offering non-uniform pricing in a given franchise area unless it faces effective competition in that franchise area as a whole, is it lawful for the operator to offer service at a discounted rate in part of a given franchise area before the FCC decides whether it faces effective competition in the franchise area as a whole?**

This issue has been fully briefed in CSR-5701 instituted May 11, 2001 (Austin, TX effective competition proceeding), CSR-5862 instituted March 1, 2002 (complaint against Adelphia for providing non-uniform pricing in Arcadia, CA), and CSR-5956 instituted August 2, 2002 (Shawnee, KS effective competition proceeding), CSR 5993 instituted on September 24, 2002 (Overland Park, KS effective competition proceeding). The operators

of incumbent cable systems have taken it upon themselves to provide rate discounts in that portion of a franchise area where a competitor operates before obtaining -- indeed often without even requesting -- a ruling that they are subject to effective competition in the franchise area as a whole. The Commission should decide whether this conduct is lawful since permitting cable operators to act as though this issue had been decided in their favor (by allowing the incumbent to offer price discounted service in the part of a franchise area where a competitor operates prior to a ruling that the franchise area as a whole is subject to effective competition) has a negative impact on competition.

**3. Does the statute permit an incumbent cable operator to provide the most popular programming packages (i.e., a package consisting of basic service plus the analog cable programming service tier and the digital tier) at different prices in different parts of a franchise area that is not subject to effective competition as long as the discounted price for this package is no lower than the undiscounted price for basic service alone?**

Incumbent cable operators contend that the statute permits this conduct. Competitors have pointed out that the statute, by its express terms, requires uniform pricing of both basic service and the cable programming service tiers ("CPST"), including digital tiers. The FCC has been asked to decide this issue in CSR-5701 instituted May 11, 2001 (Austin, TX effective competition proceeding), CSR-5862 instituted March 1, 2002 (complaint against Adelphia for providing non-uniform pricing in Arcadia, CA), and CSR-5845 instituted Feb. 1, 2002 (complaint against Time Warner for non-uniform pricing in Kansas City, MO). The FCC's decision on this issue will have a major impact on the development of competition since the incumbents' interpretation of the statute permits discounts of more than 70% for the most popular service package (i.e., expanded basic and digital service) prior to the existence of effective competition in nearly all franchise areas given that (i) the overwhelming majority of subscribers take expanded basic, not basic

alone and (ii) the undiscounted price for basic service is typically only \$10-\$15 per month whereas the undiscounted price of expanded basic (basic tier plus analog CPST) is typically more than \$30 per month., with an additional charge of \$10 per month for the digital tier in areas not subject to effective competition.

**4. Does a 12-month-long price discount qualify as a permissible “promotion” if the discount is targeted to those residing within the service area of a LEC and is offered to residents of the subject area during an open ended window?**

This issue has been fully briefed and is awaiting a Commission decision in CSR-5721 instituted July 13, 2001 (San Antonio, TX effective competition proceeding), CSR-5862 instituted March 1, 2002 (complaint against Adelphia for providing non-uniform pricing in Arcadia, CA), CSR-5956 instituted August.2, 2002 (Shawnee, KS effective competition proceeding), CSR 5993 filed September 24, 2002 (Overland Park, KS effective competition proceeding), CSR-5701 filed May 11, 2001 (Austin, TX effective competition proceeding), and CSR-5845 instituted February. 1, 2002 (complaint against Time Warner for non-uniform pricing in Kansas City, MO). While the FCC has held that an incumbent cable operator not facing effective competition may offer a discounted rate without violating the uniform rate requirement if the discount constitutes an “introductory or promotional rate,” competitors have asked the FCC to make clear that a discount qualifies as an introductory or promotional rate only if it (i) is marketed more broadly than to those living in an area served by a competitor, (ii) is offered during a discrete (as opposed to open ended) window a few weeks in length, and (iii) provides a discounted price for a period of time that is substantially less than 12 months. Incumbents, by contrast, have contended that a price-discounted offering qualifies as a promotion even when it (i) is targeted to residents of that portion of the franchise area where a competitor operates, (ii)

is offered during an open-ended window, and (iii) provides for 12 full months of discounted prices. The agency's decision on this issue will have a significant impact on competition in the cable market since a decision in favor of the incumbent cable operators would permit huge price discounts over a lengthy period of time in franchise areas where effective competition does not exist.

**5. If an incumbent's discounted price targeted to people living within the LEC's service area fails to cover the incumbent's per customer monthly programming costs (let alone any of the incumbent's other costs to provide service), does there exist an "impediment[] to households [within the LEC's service area] taking service" as that term is used in the LEC test?**

This issue is awaiting a Commission decision in CSR-5721 instituted July 13, 2001 (San Antonio, TX effective competition proceeding), CSR-5862 instituted March 1, 2002 (complaint against Adelphia for providing non-uniform pricing in Arcadia, CA), CSR-5956 filed Aug. 2, 2002 (Shawnee, KS effective competition proceeding), and CSR-5993 instituted Sept. 24, 2002 (Overland Park, KS effective competition proceeding). While the Commission has made clear that an incumbent will be deemed to face effective competition in a given franchise area under the LEC test only if there are no "impediments to households [within the LEC's service area] taking service,"<sup>1</sup> it has not ruled on the question of whether such an impediment exists if an incumbent's discounted price targeted to people living within the LEC's service area fails to cover the incumbent's per customer monthly programming costs. As with each of the other unresolved questions, resolution of this one too will have a significant impact on competition in the cable market by permitting incumbents to provide huge price discounts targeted at residents living in areas where a LEC has begun to compete.

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<sup>1</sup> Cable Reform Order, 14 FCC Rcd. 5296 at ¶ 13 (1999).

**6. If the Commission holds in favor of competitive cable operators on the preceding issue, is an incumbent operator subject to an enforcement action (such as a monetary forfeiture) if it began providing service at a discounted price in part of a given franchise area before it faced effective competition in the franchise area as a whole?**

This issue is before the FCC in CSR-5862 instituted March 1, 2002 (complaint against Adelphia for providing non-uniform pricing in Arcadia, CA), CSR-5956 filed Aug. 2, 2002 (Shawnee, KS effective competition proceeding), and CSR-5993 instituted Sept. 24, 2002 (Overland Park, KS effective competition proceeding).

### **CONCLUSION**

Everest urges the Commission to expeditiously resolve the issues presented in the cases listed above. Cable competitors face numerous challenges in the best of circumstances trying obtain funding from the capital markets and attempting to attract subscribers from entrenched and well-regarded incumbents with monopoly market share. Competitors should not have to deal with the added burden of dealing with regulatory uncertainty, when the lack of action by the regulators plays into the hands of incumbents and tilts the playing field in their favor.

Respectfully submitted,

Everest Midwest Licensee, LLC dba  
Everest Connections Corporation

/s/ \_\_\_\_\_  
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